

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

Roy Simonson
City of De Pere
925 S 6th St
De Pere WI 54115-1199

PECFA Claim #54115-1199-25
Hearing #00-974

Final Decision

PRELIMINARY RECITALS

Pursuant to a petition for hearing filed September 25, 2000, under §101.02(6)(e), Wis. Stats., and COMM 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on October 23, 2001, at Madison, Wisconsin.

The issue for determination is: Whether **the department's decision dated September 6, 2000 was correct with regard to the disputed costs identified in petitioner's appeal received by the department September 25, 2000.**

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Roy Simonson
City of De Pere
925 S 6th St
De Pere WI 54115-1199

By: Judith Schmidt-Lehman
City Attorney
City of De Pere
335 South Broadway
De Pere WI 54115-2593

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Jean Beckwith
Department of Commerce
201 W. Washington Ave.
PO Box 7838
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Acting Secretary dated September 26, 2001.

The parties have stipulated, on the record, to settlement of the issues involving the Ecosearch report, the stick-up protective pipes, and the sump installation materials with the department agreeing to pay the amount of \$585.24. The remaining two issues remain in dispute. The matter now being ready for decision, I hereby issue the following:

FINDINGS OF FACT

The appellant, City of De Pere by Roy Simonson, operated and continues to operate a municipal parking facility on the subject site. The appellant submitted its claim for reimbursement of the costs it incurred in the remediation of the petroleum-contaminated site in question in the amount of \$62,853.94. Of that amount, \$905.24 was denied by the Wisconsin Department of Commerce (department), which was responsible for administering the PECFA program, in a letter entitled Breakdown of PECFA Costs dated September 6, 2000. The appellant submitted an appeal that was received by the department on September 25, 2000 for the following items: Ecosearch report and record review (\$139.00), stick-up (Pro-tops) protective pipes (\$95.00), proctor compaction test (\$80.00), sump installation materials (\$351.24), and VOC testing following the site investigation (\$240.00).

CQM, Inc. performed a Proctor Mold - Sand test (also referred to as a Proctor Density test) at the site location in order to determine proper compaction during backfilling of the soil excavation. CQM, Inc. provided an invoice for \$80.00 to Northern Environmental and this amount was billed to the appellant on Invoice #98-G440.

The department denied reimbursement of this cost citing non-eligible analyte as their reason.

U.S. Analytical Lab performed VOC tests on water samples October 2, 1998 and April 5, 1999 to determine the presence of 1,2 Dichloroethane. U.S. Analytical provided invoices to Northern Environmental and the amounts were billed to the appellant on Invoices #98-G707 (\$365.00) and #99-G083 (\$320.00) respectively. The invoices were captioned Investigation/Remedial Action Planning and Remedial Activities and provided the period for the billing.

The department reimbursed the appellant at the PVOC rate in the amount of \$265.00 and \$200.00 respectively, and indicated this with the notation "<120.00>No letter from DNR directing Voc's-allowed for Pvoc's."

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Stats. §101.143(3)(f) provides, in part, as follows:

Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum product discharge from a petroleum product storage system:

4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.

Wisconsin Stats. §101.143(4)(c) provides, in part, as follows:

Exclusions from eligible costs. Eligible costs for an award under par. (a) does not include the following:

3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum products discharge from a petroleum products discharge system or home oil tank system.

Wisconsin Admin. Code COMM 47.30(2) provides, in part, as follows:

(2) EXCLUSIONS FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial activities under the scope of this chapter:

(15) Other costs that the department determines to be associated with, but not integral to, the remediation of a petroleum product discharge from a petroleum product storage system or home oil tank system.

(b) Costs related to improper or incompetent remedial activities and services:

4. Any costs associated with actions that exceed the necessary activities to bring a site to the required level of remediation.

(c) Costs for testing or sampling unrelated to the investigation for the extent of contamination under the scope of this chapter:

3. Costs associated with full VOC testing after the investigation phase, unless required by the DNR for monitoring PECFA eligible products and the DNR letter documenting the requirement is submitted with the claim.

DISCUSSION

Proctor Density Test

The department denied reimbursement of the cost of the Proctor Density test based on the assertion that the cost was not integral to bringing the site to the required level of remediation and therefore, the cost was unnecessary to the remediation of the site.

The appellant contends that the department should have reimbursed it for the cost of the Proctor Density test, in the amount of \$80.00, plus interest. The appellant argues that the test was necessary to be certain that the fill material placed in the excavation area where the soil was removed was sufficiently compacted. The appellant's stated reason the test was performed was so that it could replace the paved surface over the top of that excavation area and ensure that the paved surface would not fail or become uneven. It contends that this type of possible failure could necessitate removal of the paved surface and compaction of the materials prior to replacing the paved surface. Their consultant points out that the excavation and subsequent backfilling was in a high traffic area and the compaction test on the fill material was necessary for the appellant to operate on a daily basis in that area. The appellant further contends that the test is customarily performed on sites where construction is to take place on top of areas that were excavated.

Although the appellant's stated reasons appear to have merit, they do not address how this test was directly related or integral to the remediation of the petroleum product discharge. The appellant's contentions point more toward the fact that the compaction test may have been integral to the replacement and future integrity of the paved surface but was only tangentially, if at all, associated with the remediation of the petroleum discharge. Therefore, the appellant has not established that the PECFA program should reimburse the costs associated with the Proctor Density test.

VOC Test After Site Investigation

The department denied reimbursement of the cost of two rounds of VOC testing performed after the completion of the Site Investigation phase. The department contends that the appellant failed to provide a copy of a site-specific letter from the DNR that required the appellant to perform the additional rounds of testing after the site investigation was completed as required by COMM 47.30(2)(c)3.

The appellant argues that the department should provide reimbursement for the additional rounds of VOC testing following the site investigation because in the initial round of VOC testing conducted during the site investigation compounds were found outside of the less-expensive PVOC test range. The appellant contends that the only way to test for those compounds was to perform a full VOC scan. The consultant for the appellant contends that the additional rounds were consistent with DNR guidance documents. The consultant for the appellant asserts that he relied upon a 1994 memo from the DNR to the Department of Industry Labor and Human Relations (the predecessor

agency that administered the PECFA program) that stated the DNR would not provide specific letters requiring additional rounds of VOC testing following the site investigation and requiring that “all responsible parties continue monitoring for VOCs which were detected in the first round of sampling, unless the Department’s project manager has provided other written direction.” Further, the consultant relied upon a subsequent letter from the DNR that was issued in response to the appellant’s notification to the DNR of petroleum contamination on the property. This letter outlines the responsibilities of the appellant with regard to providing information by specific dates for specific actions such as hiring a consultant and the date for submitting a workplan and schedule for the investigation. The letter spoke of the department’s inability “to respond to each report,” and the consultant’s general obligation to be “familiar with our (DNR) technical procedures and administrative codes and should be able to answer your questions on meeting Wisconsin’s cleanup requirements.” The letter also goes on to clearly point out that reimbursement may be available from the PECFA program and that the appellant should contact the Department of Commerce “for more information on **eligibility and regulations for this program**” (emphasis added). This distinction points out that only the Department of Commerce makes the determination on eligibility regardless of what the DNR may provide in guidance documents.

The appellant’s argument appears to be persuasive facially but lacks the substance necessary to meet its burden. The appellant states that it is relying on a 1994 DNR memo and the general statements of a letter provided in response to the notification of contamination sent on behalf of the appellant. COMM 47.30(c)3, the administrative rule promulgated by the department, sets forth a two-part requirement that must be met in order to obtain reimbursement from the PECFA program for full VOC testing after the site investigation. First, these tests must be “required by the DNR for monitoring PECFA eligible products.” The administrative code is very clear on the point that the test must be “required by the DNR.” The general memo written 4-5 years before these tests were conducted does not control since it does not indicate that the tests were required for this site. The second requirement set forth in the code is that the letter documenting the requirement be submitted with the claim. The general letter from the DNR that the appellant submitted and relies on is even less probative than the guidance memo on this point. The letter the appellant is relying upon appears to be written solely in response to the appellant’s notification of contamination. The letter provides general guidelines and appears to be a form letter that is sent to site owners at the time they notify the DNR of contamination. There are several areas that set forth dates when reports or actions are to be taken but only speak of the need for the consultant to be “familiar with the technical procedures and administrative codes.” Nowhere in the letter does it specifically state the need for additional rounds of full VOC testing following the site investigation. Neither of these documents is probative on the point of setting forth requirements that the appellants perform additional rounds of VOC testing after the site investigation was completed. Therefore, the appellant has not established that the DNR required the additional VOC testing for this site after site investigation and that the PECFA program should reimburse the cost.

CONCLUSIONS OF LAW

The appellant was an owner or agent of a property covered by the remedial provisions of Wis Stats. 101.143.

The department was correct in denying reimbursement of costs totaling \$80.00 associated with the Proctor Density test as not integral to the remediation within the meaning of COMM 47.30(2)(a)15 and unnecessary within the meaning of COMM 47.30(2)(b)4 and Wisconsin Stats. §101.143(4)(c).

The department was correct in denying reimbursement of costs totaling \$240.00 associated with two rounds of full VOC testing completed after the site investigation within the meaning of COMM 47.30(2)(c)3.

DECISION

The department is instructed to pay the amount of \$585.24, which the parties stipulated to on the record. The department's decision to deny reimbursement for the cost of the Proctor Density test and the two rounds of VOC testing following the site investigation is affirmed.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Send or fax a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

John A. Kisiel
Administrative Law Judge
Wisconsin Department of Commerce
PO Box 7838
Madison WI 53707-7838

copies to:

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Date Mailed: _____

Mailed By: _____

